

PEER SEXUAL HARASSMENT IN SCHOOL: WHY TITLE IX DOCTRINE LEAVES CHILDREN UNPROTECTED

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ABSTRACT

In *Davis v. Monroe County Board of Education*, the Supreme Court addressed whether a private cause of action exists for students against their school for student-on-student harassment under Title IX. The Court held that in order to recover for student-on-student, or peer sexual harassment, the victim must show that the harassment was so “severe, pervasive, and objectively offensive” that it barred access to educational benefits, and that the recipient of Title IX funding acted with deliberate indifference to known acts of harassment. The Court implemented the extremely high severe, pervasive, and objectively offensive test in an attempt to protect schools from a flood of litigation. The *Davis* test, however, requires schools to respond only to the most egregious acts of peer sexual harassment, and does not adequately protect children. This Note argues that the severe, pervasive, and objectively offensive test should be altered to account for the dignity of students. The application of a dignitary model requires courts to consider the dignity that should be afforded to victims, the responsibility of schools, and the ages of students. This change will incentivize schools to respond to peer sexual harassment without causing the flood of litigation the Supreme Court feared in *Davis*.

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I. INTRODUCTION

On April 30, 2009, M.H. was late for class and encountered her high school classmate, B.P., in a stairwell.¹ The two students were alone in the stairwell, and B.P. took advantage of the situation.² He “grabbed M.H. by the arm and pressed her against the wall with all of his weight. . . . B.P. touched M.H. all over, including her legs, stomach and breasts, and bit her on the neck.”³ M.H. later noticed red marks on her neck, and reported the incident to the school.⁴ After the encounter, M.H. was diagnosed with Post-traumatic Stress Disorder (“PTSD”) and suffered from nightmares and flashbacks of the incident.⁵ Eventually she transferred high schools,

¹ *Carabello v. N.Y.C. Dep’t of Educ.*, 928 F. Supp. 2d 627, 635 (E.D.N.Y. 2013). Some of the names of the minor students involved in the cases this Note discusses have been reduced to their initials.

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* at 637.

and improved her declining grades at the new school.⁶

In *Carabello v. NYC Department of Education*, the sexual harassment lawsuit arising from B.P.'s actions, the court determined that under Title IX,⁷ M.H.'s sexual abuse, "though unfortunate," was not "severe, pervasive, or objectively offensive."⁸ The court reasoned that it was only a single incident, and M.H. was not raped or the victim of another "extreme sexual assault."⁹ Despite M.H.'s PTSD and transfer to a new high school, the court found that "no reasonable juror could conclude that the single incident of abuse deprived M.H. of educational benefits."¹⁰

The "severe, pervasive, and objectively offensive" test, articulated in *Davis v. Monroe County Board of Education*,¹¹ is only one factor that plaintiffs must establish to prove their school's wrongdoing in a case of peer sexual harassment.¹² The plaintiff must also show that the school was deliberately indifferent to the sexual harassment, and that it had actual knowledge of the acts.¹³ *Davis* defined what constitutes negligence by an educator when acts of sexual harassment among students are known to have occurred.¹⁴ Consequently, as this Note will illustrate, the severe, pervasive, and objectively offensive test that a plaintiff must pass is so high that it offers scant protection for students, and allows schools to ignore many instances of sexual harassment without fear of legal repercussions.

On its face, the severe, pervasive, and objectively offensive test seems progressive, as it is modeled after the language in Title VII addressing workplace sexual harassment.¹⁵ However, the *Davis* test has

⁶ *Id.*

⁷ 20 U.S.C. § 1681(a) (2012).

⁸ *Carabello*, 928 F. Supp. 2d at 643.

⁹ *Id.*

¹⁰ *Id.* at 644 (citing *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529, at *6 (E.D.N.Y. Oct. 27, 2004) (finding that the victim was not denied access to school resources, even though her parents removed her from school after she was afraid to go outside, had nightmares, declining grades, and attended therapy)).

¹¹ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

¹² Alana C. Brown, *Sexual Harassment in Education*, 9 GEO. J. GENDER & L. 813, 821 (2008).

¹³ John F. Walsh, *Peer Sexual Harassment in California After Davis*, 12 HASTINGS WOMEN'S L.J. 215, 220 (2001).

¹⁴ *Davis*, 526 U.S. at 650 ("[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge . . .").

¹⁵ See 42 U.S.C. § 2000e-2 (2012) (providing protection from unlawful conduct in the workplace).

left many children unprotected by its narrow interpretation and application.¹⁶ The test's extremely high standard has led scholars to accuse the Supreme Court of turning Title IX into either an "empty promise" or a "hollow victory" for victims of sexual harassment in educational settings.¹⁷ It is easy to understand why the Supreme Court's interpretation of sexual harassment under Title IX has been criticized—it has led to a decision like *Carabello* that trivialized students' experience¹⁸ as regrettably "inappropriate," and that stated that there was no "concrete negative effect" on M.H.'s education even though she developed PTSD and had to transfer schools.¹⁹

The *Carabello* decision reflects the problems that exist by relying on the Supreme Court's analysis in *Davis*, which enumerated a fairly absolute description of prohibited behavior while completely ignoring the dignity of the victims.²⁰ Nowhere in *Carabello* is M.H.'s dignity considered, or treated as something worth protecting.²¹ Rather, the court applied the severe, pervasive, and objectively offensive test without looking at the context of the environment in which the sexual harassment occurred, or considering the issue objectively from the victim's point of view.²²

Implied in Title VII workplace harassment suits is the determination of "what dignity demands" when analyzing each case.²³ In *Oncale v. Sundowner Offshore Services, Inc.*, a Title VII case involving same-sex

¹⁶ See Camille Gear Rich, *What Dignity Demands: The Challenges of Creating Sexual Harassment Protections for Prisons and Other Nonworkplace Settings*, 83 S. CAL. L. REV. 1, 11 (2009). The use of progressive language to disguise the fact that the court has drawn back protection from non-workplace sexual harassment is not unique to peer sexual harassment cases. *Id.* Camille Gear has found that there is a common trend of using Title VII wording to mask the development of harassment standards that are less protective than Title VII workplace constructs. *Id.*

¹⁷ Brown, *supra* note 12, at 822 (citation omitted); see also, Justin F. Paget, Comment, *Did Gebser Cause the Metastazization of the Sexual Harassment Epidemic in Educational Institutions? A Critical Review of Sexual Harassment Under Title IX Ten Years Later*, 42 U. RICH. L. REV. 1257, 1280 (2008) (noting that recent decisions have limited institutional liability).

¹⁸ Multiple students reported being assaulted by B.P. *Carabello v. N.Y.C. Dep't of Educ.*, 928 F. Supp. 2d 627, 635 (E.D.N.Y. 2013).

¹⁹ *Carabello*, 928 F. Supp. 2d at 643–44. M.H.'s grades did not noticeably decline at her old high school and there was no "concrete negative effect" on her education, and she was therefore not deprived of educational benefits. *Id.* The fact that she was able to raise her grades at a new school, or that she suffered from PTSD, was not considered a material factor to change the decision. *Id.*

²⁰ See *id.* at 632–37 (lacking a discussion of M.H.'s dignity or point of view).

²¹ *Id.*

²² *Id.*

²³ Rich, *supra* note 16, at 10.

workplace sexual harassment, the Supreme Court stated that “the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.”²⁴ This more subjective analysis in workplace sexual harassment is missing in peer sexual harassment cases like *Carabello*.²⁵

This Note compares Title IX peer sexual harassment cases to Title VII workplace sexual harassment cases to argue that the severe, pervasive, and objectively offensive threshold (“the *Davis* test”) is too restrictive, and introduces an alternative test to address peer sexual harassment cases. Part II looks at the problem of peer sexual harassment in public schools throughout the United States. Part III then examines the history of Title IX and how the Supreme Court used Title VI and Title VII to broaden its interpretation of Title IX to include protection against sexual harassment, while simultaneously affording less protection to victims of peer sexual harassment. Part IV looks at how the severe, pervasive, and objectively offensive test has been interpreted by courts, compares it to the “severe or pervasive” test under Title VII, and illustrates how the *Davis* test falls short. Part V presents why courts’ understanding of the severe, pervasive, and objectively offensive test should be altered, how this change would protect children at school, and why lowering the threshold would not cause excessive litigation under Title IX. Part VI concludes.

II. SEXUAL HARASSMENT IN SCHOOLS

Sexual harassment has become a widespread issue in American schools.²⁶ For the purposes of this Note, sexual harassment is defined as “unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.”²⁷ Peer sexual harassment is a specific type of sexual harassment that is committed by colleagues, as opposed to sexual harassment by someone in a position of power.²⁸ A report from the Office for Civil Rights states that “during the 2007–2008 school year,

²⁴ *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998).

²⁵ Compare *id.* (using a more subjective analysis), with *Carabello*, 928 F. Supp. 2d at 632–37 (using a more objective analysis).

²⁶ NAN STEIN, CLASSROOMS & COURTROOMS: FACING SEXUAL HARASSMENT IN K–12 SCHOOLS 11 (1999).

²⁷ Russlynn Ali, *Dear Colleague Letter: Harassment and Bullying*, OFFICE FOR CIVIL RIGHTS 6 (Oct. 26, 2010), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

²⁸ Monica Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2128 (1993).

there were 800 reported incidents of rape and attempted rape and 3800 reported incidents of other sexual batteries at public high schools.”²⁹ A different study found that about 48% of students in grades seven through twelve experienced some form of peer sexual harassment over the course of a year.³⁰ Of these numbers, 8% reported being touched in an unwelcome sexual way, 6% were physically intimidated in a sexual way, and 2% were forced to do something sexual.³¹ Additionally, 33% of the respondents experienced unwelcome sexual comments, jokes, or gestures.³² The respondents’ own comments, including “a boy tried to unzip my pants,” and “they tried to corner me in the soccer goal to touch my [private parts],” highlight the disturbing nature of these unwelcome sexual encounters.³³

A. RESPONSES TO PEER HARASSMENT

Victims of peer sexual harassment report a number of negative consequences resulting from their experiences.³⁴ These include “feelings of embarrassment, fear, anger, frustration, loss of self-confidence, powerlessness, and cynicism about education.”³⁵ These emotional responses can often manifest in physical symptoms including “insomnia, listlessness and depression, which often results in a reduced ability to perform schoolwork, excessive absenteeism, and frequent tardiness.”³⁶

²⁹ Ali, *supra* note 27, at 2.

³⁰ CATHERINE HILL & HOLLY KEARL, AMERICAN ASSOC. OF UNIV. WOMEN, CROSSING THE LINE 2 (2011), *available at* <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>. This study included a nationally representative survey done by the American Association of University Women (“AAUW”), which polled 1965 students in grades seven through twelve and which was conducted in May and June of 2011. *Id.* Students were asked whether they had experienced: (1) having someone make unwelcome sexual comments, jokes, or gestures; (2) being called gay or lesbian in a negative way; (3) being touched in an unwelcome sexual way; (4) having someone flash or expose themselves; (5) being shown sexy or sexual pictures that you didn’t want to see; (7) being physically intimidated in a sexual way; and (7) being forced to do something sexual. *Id.* at 10.

³¹ *Id.* at 12 Figure 2.

³² *Id.*

³³ *Id.* at 14.

³⁴ The AAUW report found that of the respondents who were sexually harassed: 32% did not want to go to school, 31% felt sick to their stomach, 21% found it hard to study, 19% had trouble sleeping, 12% stayed home from school, 10% got into trouble at school, 9% changed the way they traveled to or from school, 8% stopped doing an activity or sport, and 4% switched schools. *Id.* at 23.

³⁵ Sherer, *supra* note 28, at 2133.

³⁶ *Id.* at 2134.

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Though “[p]hysical harassment is less common than verbal harassment . . . it tends to have stronger negative effects on students.”³⁷ A sexually abusive environment, therefore, may deprive students from many benefits of their academic programs, which could be a violation of Title IX.³⁸

Despite the prevalence of sexual harassment in schools, only 9 percent of students who reported being sexually harassed in the AAUW study reported the incident to a teacher, guidance counselor, or other adult at school.³⁹ Low reporting numbers may be in part due to the prevalence of harassment at schools and the lack of adequate responses by administrators to prevent it, thereby allowing it to become routine and publicly acceptable.⁴⁰ The pervasiveness of sexual harassment in schools has led some school officials to argue, “that it resides in the realm of matters beyond the control of administrators.”⁴¹ Stein states that this argument:

shows an acknowledgement of the pervasiveness of sexual harassment; yet in the next breath they [school officials and their lawyers] claim that such pervasiveness means that they cannot do anything about curbing yet alone ending student-to-student sexual harassment.⁴²

In response to the “epidemic” of peer sexual harassment, *Davis* provided students legal recourse against schools that are indifferent to known acts of sexual harassment.⁴³ Despite the *Davis* decision, as shown by the AAUW survey, peer sexual harassment has continued to be a major problem at schools.⁴⁴ At first glance, one might think that school officials have been correct in stating that they cannot curb peer sexual harassment

³⁷ HILL & KEARL, *supra* note 30, at 10.

³⁸ Sherer, *supra* note 28, at 2156.

³⁹ HILL & KEARL, *supra* note 30, at 2.

⁴⁰ STEIN, *supra* note 26, at 11.

⁴¹ *Id.* at 93; see also Edward S. Cheng, *Boys Being Boys and Girls Being Girls—Student-to-Student Sexual Harassment from the Courtroom to the Classroom*, 7 UCLA WOMEN’S L.J. 263, 269–72 (1997) (noting that multiple faculty members felt that harassment could not be stopped by a school).

⁴² STEIN, *supra* note 26 at 93.

⁴³ See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 653–54 (1999) (finding liability for deliberate indifference to reports of sexual harassment in schools).

⁴⁴ See generally *Carabello v. N.Y.C. Dep’t of Educ.*, 928 F. Supp. 2d 627 (E.D.N.Y. 2013) (recommending summary judgment against a claim of peer sexual harassment); *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529 (E.D.N.Y. Oct. 27, 2004) (dismissing federal claims of peer sexual harassment).

due to the threat of possible lawsuits under Title IX.⁴⁵ In light of *Davis*, however, students are afforded very little protection from sexual harassment and schools are provided with little impetus to proactively combat sexual harassment.⁴⁶

III. THE HISTORY OF TITLE IX AND SEX DISCRIMINATION

A. LEGISLATIVE HISTORY

Title IX was modeled after Title VI and Title VII, and courts have looked to both statutes to determine a school's liability under Title IX for peer sexual harassment.⁴⁷ Title VI prohibits discrimination on the basis of race under federally assisted programs,⁴⁸ and Title VII prohibits workplace discrimination on a number of bases, including sex.⁴⁹ An amendment was introduced in 1971 to extend the prohibition of discrimination to schools, and this eventually became Title IX of the Education Amendments of 1972.⁵⁰ Title IX is a mix of Title VI and Title VII in that it offers protection against sex discrimination in schools that receive federal aid.⁵¹

Since Title IX was introduced as a floor amendment, the courts have had little legislative history to guide their interpretation of Title IX's scope, creating uncertainty.⁵² The Supreme Court originally interpreted Title IX narrowly along the lines of Title VI, so that it would apply only to programs that received direct federal funding.⁵³ Congress, however, felt that the Supreme Court misinterpreted the scope of Title IX and passed the Civil Rights Restoration Act of 1987,⁵⁴ making Title IX applicable to all

⁴⁵ See HILL & KEARL, *supra* note 30, at 10 (discussing the prevalence of peer sexual harassment in schools).

⁴⁶ See *infra* Part IV.

⁴⁷ Carrie L. Hoon, Comment, *The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools*, 76 WASH. L. REV. 213, 221–23 (2001).

⁴⁸ 42 U.S.C. § 2000d (2012) (“No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”).

⁴⁹ 42 U.S.C. § 2000e-2(a)(1) (2012) (“It shall be unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . .”).

⁵⁰ Brown, *supra* note 12, at 815.

⁵¹ 20 U.S.C. §§ 1681–1688 (2012).

⁵² Paget, *supra* note 17, at 1260–61.

⁵³ Brown, *supra* note 12, at 815.

⁵⁴ See Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988) (“The Congress finds that . . . certain aspects of recent decisions and opinions of the Supreme Court have unduly

programs within schools receiving federal aid.⁵⁵

B. THE *DAVIS* DECISION

The previously mentioned *Davis v. Monroe County Board of Education* is one of the most important decisions following the passage of the Civil Rights Restoration Act of 1987. In that case, LaShonda was the victim of prolonged sexual harassment by one of her classmates, G.F., when she was in the fifth grade.⁵⁶ For months, G.F. attempted to touch LaShonda's breasts and genital area, and made statements like, "I want to get in bed with you," and, "I want to feel your boobs."⁵⁷ On another occasion, G.F. suggestively rubbed his body against LaShonda.⁵⁸ She reported the incidents to her teachers multiple times, but G.F. continued to harass her until he pleaded guilty to sexual battery.⁵⁹ LaShonda became unable to concentrate on her studies, her grades fell, and in April of 1993, her father found a suicide note that she had written.⁶⁰ Despite reporting the incidents of sexual harassment repeatedly, no disciplinary action was taken by the school and no effort made to separate LaShonda and G.F. In fact, the principle allegedly asked LaShonda why she "was the only one complaining."⁶¹

The Supreme Court used LaShonda's case to address whether a private suit under Title IX may be brought against a school district that fails to respond to peer sexual harassment.⁶² *Davis* makes clear that private action under Title IX for sexual harassment should be brought by the victim in an attempt to hold the school liable for its own decision to be indifferent to known peer sexual harassment.⁶³ Since the Supreme Court already concluded in *Franklin*⁶⁴ and *Gebser*⁶⁵ that teacher-to-student

narrowed or cast doubt upon the broad application of Title IX of the Education Amendments of 1972 generally, Section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and title VI of the Civil Rights Act of 1964.").

⁵⁵ Paget, *supra* note 17, at 1260–61.

⁵⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633–34 (1999).

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.* at 635.

⁶² *Id.* at 639.

⁶³ *Id.* at 641–42.

⁶⁴ *Franklin v. Gwinnet Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992).

⁶⁵ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

sexual harassment is a form of discrimination in violation of Title IX, the Court also had to apply this test to peer sexual harassment.⁶⁶ The Court followed its reasoning in *Gebser* and held that Title IX was enacted pursuant to the Spending Clause, and therefore a private cause of action only exists when recipients of federal funding have adequate notice that they could be liable for the conduct at issue.⁶⁷ The majority in *Davis* also explained that school administrators would only be deemed “deliberately indifferent” to peer harassment if the response to the harassment was “clearly unreasonable in light of the known circumstances.”⁶⁸

In addition to the actual notice and deliberate indifference requirements, *Davis* added the requirement that the harassment must be so “severe, pervasive, and objectively offensive that it deprives victims of access to educational opportunities or benefits provided by the school.”⁶⁹ The “severe” and “pervasive” language likely comes from standard Title VII sexual harassment cases.⁷⁰ “Objectively offensive,” however, was taken from the Supreme Court’s reasoning in *Oncale v. Sundowner Offshore Services, Inc.*, in which the Court determined that same-sex sexual harassment could be actionable under Title VII.⁷¹ In *Oncale*, the Court reinforced the idea that Title VII is not a general civility code, and that it only prohibits behavior so objectively offensive that it alters the conditions of the victim’s employment.⁷² The Court reasoned that workplace behavior depends on the circumstances, expectations, and relationships within the workplace, and thus sexual harassment claims should be judged “from the perspective of a reasonable person in the plaintiff’s position, considering ‘all the circumstances.’”⁷³ Similarly, *Davis* reinforced that Title IX is not an antibullying code.⁷⁴ The Court therefore expects the lower courts to consider the “constellation of surrounding circumstances, expectations and relationships,” and remember that children regularly act in ways that would be unacceptable among

⁶⁶ *Davis*, 526 U.S. at 649–50.

⁶⁷ *Id.*

⁶⁸ *Id.* at 648.

⁶⁹ *Id.* at 650.

⁷⁰ *Id.* at 651; see also *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (requiring sexual harassment to be “sufficiently severe or pervasive” to be actionable).

⁷¹ Compare *Davis*, 526 U.S. at 651 (holding that a valid sexual harassment claim must include objectively offensive conduct), with *Vinson*, 477 U.S. at 67 (making no mention of the necessity of objectively offensive conduct).

⁷² *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

⁷³ *Id.* at 81–82 (quoting *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 23 (1993)).

⁷⁴ *Davis*, 526 U.S. at 651–52.

adults.⁷⁵ *Davis*, however, offered little real guidance about how to analyze peer sexual harassment cases, especially since it is the seminal case under Title IX and involves physical harassment that easily meets the high severe, pervasive, and objectively offensive threshold.⁷⁶

Davis struggled to balance the protection of students with a desire to keep frivolous lawsuits out of court. In doing so, the Court stressed the importance of not imposing “sweeping liability” on schools under Title IX for peer sexual harassment, and warned courts below that Title IX peer harassment is different from Title VII workplace harassment, without giving a working definition of peer sexual harassment.⁷⁷ In fact, the majority opinion focused mostly on explaining why the decision would not cause excessive litigation, as opposed to focusing on the rights of the students that are victims of sexual harassment, and the lack of response to their complaints.⁷⁸

Justice Kennedy’s dissent in *Davis* reflected the reluctance that some have in holding schools liable under Title IX for students’ actions.⁷⁹ Kennedy wrote that Title IX does not impose liability on schools for peer sexual harassment.⁸⁰ The dissent argued that children are not fully accountable for their actions, and that “a teenager’s romantic overtures to a classmate, even when persistent and unwelcome, are an inescapable part of adolescence.”⁸¹ The disturbing implication of this statement is that LaShonda’s harassment is an inappropriate but normal part of the high school experience. The dissent predicted that the *Davis* decision would cause difficulties for schools in identifying peer sexual harassment of a verbal nature, but failed to recognize that blatant nonverbal acts of sexual assault occur in school.⁸² Kennedy also stated that the decision in *Davis* imposed a new burden on the federal courts to second-guess disciplinary actions taken by school administrators in addressing misconduct, which the Court had refused to do in the past.⁸³ The issue with this view is that it

⁷⁵ *Id.* (quoting *Oncale*, 523 U.S. at 82).

⁷⁶ *Id.* at 653.

⁷⁷ *Id.* at 652.

⁷⁸ *See id.* at 639–53 (featuring approximately ten pages of the majority’s opinion dealing with the ability of a plaintiff to collect on a sexual harassment claim, and approximately five pages discussing what sexual harassment is).

⁷⁹ *Id.* at 656 (Kennedy, J., dissenting).

⁸⁰ *Id.* at 656–57.

⁸¹ *Id.* at 675.

⁸² *See id.* at 675–76 (“The difficulties schools will encounter in identifying peer sexual harassment are already evident in teachers’ manuals designed to give guidance on the subject.”).

⁸³ *Id.* at 678–79.

disregards the fact that many school administrators have ignored incidents of sexual harassment in their schools altogether, which is what *Davis* attempted, or should have attempted, to remedy by holding schools liable for indifference to known acts of sexual harassment.⁸⁴

IV. INTERPRETING *DAVIS*—WHAT DOES “SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE” MEAN?

Courts have struggled to interpret the *Davis* decision because of the ambiguity inherent in its test for peer sexual harassment. The terms severe, pervasive, and objectively offensive have all been defined through sexual harassment litigation under Title VII, but Title IX litigation has altered the meanings of these terms.⁸⁵ Although differences exist between Title IX and Title VII sexual harassment jurisprudence, the contrast between those involving single acts under Title VII and Title IX illustrate the effects that the shifting definitions of the terms have had.⁸⁶ Because administrator responses only come into play in Title IX litigation if a student is found guilty of sexual harassment, Title IX cases considered in this section do not look at school administration’s reaction to alleged acts of sexual harassment; it only looks at a court’s analysis of whether the alleged acts meet the severe, pervasive, and objectively offensive test. This section will show how focusing upon student actions, instead of an administration’s actions, offers students very little protection from peer sexual harassment.

⁸⁴ *See id.* at 633–35 (majority opinion) (discussing how school administrators ignored multiple complaints of harassment by LaShonda, allowing the harassment to continue); *Murrell v. Sch. Dist. No. 1, Denver, Colo.*, 186 F.3d 1238 (10th Cir. 1999) (concerning a developmentally disabled girl who was battered and sexually assaulted multiple times by another student, but whose teacher, when informed of the assaults, told her not to tell her mother about the incidents and to try and forget it had happened); *T.Z. v. City of N.Y.*, 634 F. Supp. 2d 263 (E.D.N.Y. 2009) (discussing how a teacher ignored the screams of a student as she was being held down by classmates while another student touched her vagina and buttocks through her clothes, and then pulled down her pants and continued to violate her); *Doe v. Dall. Indep. Sch. Dist.*, No. CA 3:01-CV-1092-R, 2002 U.S. Dist. LEXIS 13014 (N.D. Tex. Jul. 16, 2002) (stating that a five year old boy used his hand to penetrate his classmate’s vagina, resulting in vaginal bleeding, pain while urinating, and abdominal pain; but when the girl’s mother confronted the principal, the principal did nothing to separate the children and accused the girl of fabricating the entire incident, even when confronted with medical evidence of the penetration).

⁸⁵ *See cases cited supra* note 84 (illustrating how litigation has been affected by the different definitions used for terms in Title VII and Title IX cases).

⁸⁶ *See cases cited supra* note 84 (illustrating how litigation has been affected by the different definitions used for terms in Title VII and Title IX cases).

A. THE SIGNIFICANCE OF “AND” VERSUS “OR”

The first striking difference between Title VII and Title IX is the language of the “severe and pervasive” test.⁸⁷ Title VII uses severe or pervasive while Title IX uses severe and pervasive.⁸⁸ The Seventh Circuit helped define the Title VII test in a sexual harassment workplace suit in which an employee alleged that her supervisor touched her breast.⁸⁹ The opinion stated, “[t]here is no minimum number of incidents required to establish a hostile work environment. That is because ‘harassment need not be both severe and pervasive to impose liability; one or the other will do.’”⁹⁰ Alternatively, the *Davis* test requires both severity and pervasiveness, which makes bringing suits for single acts of sexual harassment almost impossible.⁹¹ *Davis*, however, allows that “in theory, a single instance of sufficiently severe one-on-one peer harassment” could be sufficient to rise to the level of denying the victim equal access to an educational program.⁹² The only guidance offered by the Court as to single instances of harassment was that “we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment.”⁹³ In essence the “and” in the *Davis* test legally allows single acts of sexual harassment, as in *Carabello*, to go unnoticed by schools.

B. WHAT IS SEVERE?

In single act–sexual harassment cases, Title VII prescribes inappropriate physical touching as severe enough to meet the severe or pervasive test. In most workplace sexual harassment suits, single acts do not normally rise to the level of “sufficiently severe or pervasive to alter the conditions of the victim’s employment,” unless the act was extraordinarily severe.⁹⁴ Federal courts have taken a strong stance against

⁸⁷ *Worth v. Tyer*, 276 F.3d 249, 267 (7th Cir. 2001).

⁸⁸ *Davis*, 526 U.S. at 647.

⁸⁹ *Worth*, 276 F.3d at 255.

⁹⁰ *Id.* at 268 (quoting *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 2000)).

⁹¹ *Davis*, 526 U.S. at 652–53.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Cruz v. Coach Stores, Inc.*, 202 F.3d 560, 570 (2d Cir. 1999) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)) (*rev’d on other grounds*, *Swierkiewicz v. Sorema*, 534 U.S. 506

“inappropriate touching” because instances of physical contact are among the most severe and psychologically damaging types of sexual harassment.⁹⁵ For instance, in *Reid v. Ingerman Smith LLP*, the court found that a coworker grabbing the breast of a victim one time was extraordinarily severe, because this act constituted direct contact with an intimate body part.⁹⁶ Federal courts have found physical contact with intimate body parts extraordinarily severe because reasonable people do not expect to give up control over who can touch their body at work.⁹⁷ Thus, people usually expect to be treated with a certain level of respect at work, so physical contact that surpasses what is expected between friendly coworkers infringes upon their dignity.⁹⁸

Though a single act of inappropriate touching of intimate body parts can be actionable under Title VII, courts have found “sufficiently severe harassment” from a single incident under Title IX only in cases of extreme sexual assault, such as rape.⁹⁹ As the court in *T.Z. v. City of New York* explained, “While it may be ‘inevitable’ that students will ‘tease and embarrass each other, share offensive notes, flirt, push and shove in the halls, grab and offend’ . . . it is not inevitable that groups of teenage students will commit sexual assaults on school property that rise to the level of felonies.”¹⁰⁰ *T.Z.* involved a fourteen-year-old girl who was held down by a boy in a classroom, while another touched her vagina and buttocks before removing her clothing and touching her further.¹⁰¹ The court held that this assault was sufficiently severe to satisfy the *Davis* test because it went further than cases that consisted of “simple inappropriate touching.”¹⁰² *Doe v. Dallas Independent School District* found that a single instance of forced manual penetration of a five-year-old girl’s

(2002)).

⁹⁵ *Patton v. Keystone RV Co.*, 455 F.3d 812, 816 (7th Cir. 2006); *see also Worth*, 276 A.2d at 268 (“[D]irect contact with an intimate body part constitutes one of the most severe forms of sexual harassment.”).

⁹⁶ *Reid v. Ingerman Smith LLP*, 876 F. Supp. 2d 176, 186 (E.D.N.Y. 2012) (quoting *Redd v. N.Y. State Div. of Parole*, 678 F.3d 166, 177 (2d Cir. 2012)).

⁹⁷ *Patton*, 455 F.3d at 816 (“When entering a workplace, reasonable people expect to have their autonomy circumscribed in a number of ways; but giving up control over who can touch their body is usually not one of them.”).

⁹⁸ *Id.*

⁹⁹ *Carabello v. N.Y.C. Dep’t of Educ.*, 928 F. Supp. 2d 627, 642–43 (E.D.N.Y. 2013).

¹⁰⁰ *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 272 (E.D.N.Y. 2009) (quoting *Davis v. Monroe Bd. of Educ.* 526 U.S. 629, 673 (1999) (Kennedy, J., dissenting)).

¹⁰¹ *Id.* at 271.

¹⁰² *Id.*

vagina qualified as sufficiently severe peer sexual harassment.¹⁰³

Though the courts in the above cases certainly ruled correctly, the language implied that anything besides rape or other serious sexual assault is considered simple inappropriate touching.¹⁰⁴ This implication leaves students unprotected from many instances of sexual assault, like in *Carabello*, in which the high school victim was shoved against a wall, touched all over, and bitten on the neck.¹⁰⁵ The assault in *Carabello* would surely qualify as “extremely severe” under Title VII, but not under Title IX.¹⁰⁶

Carabello is not the only case that illustrates the lack of protection for students under Title IX. In *Soriano v. Board of Education*, Stephanie, a fourth grader, was confronted by a group of three male classmates.¹⁰⁷ Two of the boys told Michael to “rape her” and he then touched Stephanie’s vagina over her skirt, against her will.¹⁰⁸ Later, another boy, Darnell, slapped Stephanie’s buttocks and put his arms around her while “sweet talking” her—Stephanie slapped him and hid behind her teacher.¹⁰⁹ After these incidents, Stephanie began getting lower grades and having nightmares, and she was also afraid to go out and play.¹¹⁰ The court held that the acts were “strikingly offensive,” but not severe enough to have deprived Stephanie of access to her school’s resources and opportunities, despite the psychological effect that the harassment had upon her.¹¹¹ Unlike the interpretation of Title VII that “reasonable people do not expect to give up control over who can touch their body at work,”¹¹² students are clearly expected to give up a significant amount of control over who can touch their intimate body parts.

C. WHAT IS PERVASIVE?

While most Title IX and Title VII cases have correctly used

¹⁰³ Doe v. Dall. Indep. Sch. Dist., No. CA 3:01-CV-1092-R, 2002 U.S. Dist. LEXIS 13014, at *17 (N.D. Tex. Jul. 16, 2002).

¹⁰⁴ *T.Z.*, 634 F. Supp. 2d at 271.

¹⁰⁵ *Carabello v. N.Y.C. Dep’t of Educ.*, 928 F. Supp. 2d 627, 635 (E.D.N.Y. 2013).

¹⁰⁶ *See supra* Part III.A. (noting the different tests utilized in Title VII and Title IX litigation).

¹⁰⁷ *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529, at *4 (E.D.N.Y. Oct. 27, 2004).

¹⁰⁸ *Id.* at *5.

¹⁰⁹ *Id.* at *7.

¹¹⁰ *Id.* at *8.

¹¹¹ *Id.* at *21.

¹¹² *Patton v. Keystone RV Co.*, 455 F.3d 812, 816 (7th Cir. 2006).

“pervasive,” some Title IX cases have utilized pervasive as meaning “persistent,” even though the words have different meanings.¹¹³ The federal government does not interpret the words similarly, as the Office for Civil Rights states that “sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education.”¹¹⁴ Pervasive is typically defined as “existing in or spreading through every part of something,”¹¹⁵ while the definition of persistent is “continuing in a course of action without regard to opposition or previous failure.”¹¹⁶

While some cases have understood pervasive as relating to frequency only, others have found that pervasiveness means much more than frequency.¹¹⁷ Thus, in fact-specific Title VII harassment cases, exact parameters for pervasive sexual harassment are difficult to determine.¹¹⁸ The court in *Carrero v. New York Housing Authority* stressed that pervasiveness does not require a pattern of harassment, and that an employee need not be subjected to an extended period of demeaning provocation before seeking remedy under Title VII.¹¹⁹ Rather, one must look at whether the conduct was “sufficiently pervasive to create an offensive environment.”¹²⁰

Regardless, many courts tend to incorrectly only look at frequency to determine pervasiveness. In typical workplace harassment suits, the acts must be “sufficiently continuous and concerted,” which implies frequency.¹²¹ In *Billings v. Town of Grafton*, the court found that continual staring at female employees’ breasts could be sexual harassment because

¹¹³ See *infra* notes 117–19 and accompanying text.

¹¹⁴ Norma V. Cantu, *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties*, OFFICE FOR CIVIL RIGHTS, <http://www2.ed.gov/about/offices/list/ocr/docs/sexhar00.html> (last modified Mar. 14, 2005).

¹¹⁵ *Pervasive*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/pervasive> (last visited Dec. 18, 2013).

¹¹⁶ MERRIAM-WEBSTER, WEBSTER'S THIRD NEW INT'L DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 1668 (Philip Babcock Gove & the Merriam-Webster Editorial Staff, eds., 2002).

¹¹⁷ *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529, at *20–21 (E.D.N.Y. Oct. 27, 2004).

¹¹⁸ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993) (“This is not, and by its nature cannot be, a mathematically precise test.”); see also *Billings v. Town of Grafton*, 515 F.3d 39, 49 (1st Cir. 2008) (“The highly fact-specific nature of a hostile environment claim tends to make it difficult to draw meaningful contrasts between one case and another for purposes of distinguishing between sufficiently and insufficiently abusive behavior.”).

¹¹⁹ *Carrero v. N.Y.C. Hous. Auth.*, 890 F.2d 569, 577–78 (2d Cir. 1989).

¹²⁰ *Id.* at 578.

¹²¹ *Id.* at 577.

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of the frequency of the act.¹²² *Lee-Crespo v. Schering-Plough Del Caribe Inc.* cited the “Harris factors”¹²³ to determine that the complained of harassment was “episodic, but not so frequent as to become pervasive.”¹²⁴ *Harris v. Forklift Systems* did not actually set forth concrete factors, but gave examples of what a court “may include” in its evaluation of hostile environments.¹²⁵ The Court, however, did not provide information that other courts must include or abide by in their decisions.¹²⁶ The *Harris* Court stated that while the frequency of the discriminatory conduct “may be taken into account, no single factor is required.”¹²⁷

The tendency to analyze the pervasiveness of sexual harassment through frequency of acts has caused some problems in defining pervasive under the *Davis* test, and many Title VII cases dealing with a single act of sexual harassment do not touch on the issue of pervasiveness at all. Since only severity is required to pass the *Davis* test, it matters less when courts define pervasive more similarly to persistent because they do not need to justify a single act with frequency of conduct.¹²⁸ In Title IX cases involving severe acts of sexual harassment, this incongruity becomes an issue depending on how the court interprets *Davis*. The *Davis* test presumably allows a single instance of sufficiently severe student conduct to deny a victim equal access to an educational program or activity, but courts do not always interpret *Davis* in that way.¹²⁹

Soriano interpreted *Davis* to require multiple acts of harassment.¹³⁰ The decision stated that the Supreme Court found it unlikely that a single instance of peer harassment could rise to the level where relief is appropriate, and therefore that Title IX is limited to cases with a “systemic

¹²² *Billings*, 515 F.3d at 49–51.

¹²³ The *Billings* court refers to the inquiry in *Lee-Crespo* as applying the “Harris factors.” *Id.* at 50. The factors are not referred to by this title in *Lee-Crespo*. See *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 46 (1st Cir. 2003) (making no mention of Harris factors).

¹²⁴ *Lee-Crespo*, 354 F.3d at 46.

¹²⁵ See *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993) (listing other factors such as the frequency and severity of the conduct, whether it was physical or verbal in nature, whether it interferes with work performance, and the effect on the victim’s psychological health).

¹²⁶ See *id.* (“[N]o single factor is required.”).

¹²⁷ *Id.*

¹²⁸ See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. at 652–53 (1999) (finding a single act could possibly constitute sexual harassment).

¹²⁹ *Id.*

¹³⁰ *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529, at *20–21 (E.D.N.Y. Oct. 27, 2004).

effect” of denying access to education.¹³¹ The court in *Schaefer v. Las Cruces Public School District* found that “a single attack, by definition, cannot be pervasive.”¹³² The male victim in *Schaefer* was “racked”¹³³ four times over the course of two months,¹³⁴ and his abdominal pain, nausea, severe and constant pain in his testicles, and cramping caused him to be absent from school.¹³⁵ The court held that though the acts were severe and objectively offensive, it was not pervasive enough to satisfy the *Davis* test.¹³⁶ The court acknowledged that in Title VII cases, the Tenth Circuit does not view pervasive as a “counting measure,” but felt that the Tenth Circuit analyzed pervasive differently under Title IX.¹³⁷ The disturbing aspect of this case is that the racking occurred four times in a relatively short period, which resulted in severe medical issues and caused the victim to miss school.¹³⁸ If this is not considered pervasive enough, then what is? Even LaShonda, in *Davis*, would not have been able to recover damages under this interpretation of severe, pervasive, and objectively offensive.¹³⁹

The *Davis* test’s requirement of both severity and pervasiveness makes it more important under Title IX that pervasive is not analyzed by looking solely at frequency. As Title VII requires severity *or* pervasiveness, severe acts of sexual harassment can easily be actionable without trying to justify why the act is pervasive. *Davis* required both severe *and* pervasive, but allowed that a single act could constitute harassment if severe enough.¹⁴⁰ Thus, pervasive must be understood as more than just frequent acts, otherwise a single act could not constitute harassment, even though *Davis* stated that it possibly could.¹⁴¹ The difficulty is that many courts turn to Title VII case law to determine the

¹³¹ *Id.*

¹³² *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1082 (D.N.M. 2010).

¹³³ Racking involves being kicked in the testicles. *Id.* at 1059–60.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.* at 1082–83.

¹³⁷ *Id.* (quoting *Nieto v. Kapoor*, 268 F.3d 1208, 1219 n.8 (10th Cir. 2001)).

¹³⁸ *Id.* at 1059–62.

¹³⁹ Compare *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 631 (1999) (holding multiple instances of harassment that occurred over the course of a number of months to be pervasive), with *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1082–83 (D.N.M. 2010) (holding four assaults that occurred over two months to be a single attack, and therefore not pervasive).

¹⁴⁰ *Davis*, 526 U.S. at 652–53.

¹⁴¹ *Id.*

meaning of pervasive under Title IX.¹⁴² Frequency of acts is often an indicator of pervasiveness under Title VII, and courts use this definition in Title IX cases.¹⁴³ Therefore, students must put up with sexual harassment a number of times before their case can be actionable under Title IX, even though *Davis* stated otherwise.¹⁴⁴

Other courts have not misapplied Title VII law, and have provided greater protection to children by not equating pervasiveness with frequency. As one court explained, “a sufficiently serious one-time sexual assault may satisfy the ‘pervasiveness’ requirement of the *Davis* test.”¹⁴⁵ Another court held that *Davis* mentioned nothing about persistent abuse of a victim and specifically used the word pervasive to mean more than just frequency.¹⁴⁶

D. WHAT IS OBJECTIVELY OFFENSIVE?

The objectively offensive prong is the least defined part of the *Davis* test.¹⁴⁷ With *Davis*, the Supreme Court did not establish a reasonableness standard to determine what might be objectively offensive,¹⁴⁸ though a reasonableness standard has been applied to Title VII harassment suits.¹⁴⁹ The only indication the Supreme Court gave to assist in determining what is *not* objectively offensive was to state that, “[i]t is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it.”¹⁵⁰ This guidance does little to inform courts about how to identify objectively offensive conduct, besides alerting

¹⁴² *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993); *Billings v. Town of Grafton*, 515 F.3d 39, 49 (1st Cir. 2008); *Lee-Crespo v. Schering-Plough Del Caribe Inc.*, 354 F.3d 34, 46 (1st Cir. 2003).

¹⁴³ *Schaefer*, 716 F. Supp. 2d at 1082–83; *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529, at *5 (E.D.N.Y. Oct. 27, 2004). *Soriano* interpreted *Davis* to require multiple instances of harassment. *Id.*

¹⁴⁴ *Davis*, 526 U.S. at 631.

¹⁴⁵ *T.Z. v. City of N.Y.*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009).

¹⁴⁶ *Doe v. Dall. Indep. Sch. Dist.*, No. CA 3:01-CV-1092-R, 2002 U.S. Dist. LEXIS 13014, at *15–17 (N.D. Tex. Jul. 16, 2002).

¹⁴⁷ *See Davis*, 526 U.S. at 650–53 (providing little guidance on what qualifies as “objectively offensive”).

¹⁴⁸ Hoon, *supra* note 47, at 214.

¹⁴⁹ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81 (1998) (“We have emphasized, moreover, that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff’s position, considering all the circumstances.”).

¹⁵⁰ *Davis*, 526 U.S. at 651–52.

courts to avoid implementing the reasonable person standard used in workplace harassment suits, and to neglect to establish a reasonableness standard for schools to determine what amounts to actionable sexual harassment in the classroom.¹⁵¹ The Court also cautioned that schools are very different from the workplace, and what is offensive in the workplace might not be offensive at school.¹⁵² The Court, however, neglected to consider that children, unlike adults, have less independence and usually no choice in their educational environment.¹⁵³ Though there are some real differences in maturity that affect the range of actionable peer sexual harassment, children should not be expected to accept an abusive environment at school. The classroom, after all, is the precursor to the workplace.¹⁵⁴

The high threshold of Title IX has protected schools and courts from excessive damages.¹⁵⁵ This threshold has, however, ignored the dignity of the victims, stating that their experiences are merely “unfortunate,” but not enough to grant them relief.¹⁵⁶ Though Title IX punishes the most “sufficiently severe” violations by students and by the school, the truly unfortunate victims are left unprotected until they suffer a certain number of acts to satisfy the pervasive requirement.¹⁵⁷ Title VII was meant to influence primary conduct, and thus its objective is “not to provide redress but to avoid harm.”¹⁵⁸ Title IX’s peer sexual harassment doctrine should focus not only on giving relief to victims, but motivating schools to avoid lawsuits and address peer sexual harassment. The severe, pervasive, and objectively offensive test does not meet this goal because it sets a very high threshold without providing any reasonableness standard that schools can use to determine what acts constitute sexual harassment.¹⁵⁹

¹⁵¹ Hoon, *supra* note 47, at 214.

¹⁵² *Davis*, 526 U.S. at 651.

¹⁵³ Sherer, *supra* note 28, at 2156–57.

¹⁵⁴ *Id.* at 2158, 2164–65.

¹⁵⁵ *See* *Schaefer v. Las Cruces Pub. Sch. Dist.*, 716 F. Supp. 2d 1052, 1082–83 (D.N.M. 2010) (holding that four assaults over the course of two months was not pervasive).

¹⁵⁶ *Carabello v. N.Y.C. Dep't of Educ.*, 928 F. Supp. 2d 627, 643 (E.D.N.Y. 2013).

¹⁵⁷ *Schaefer*, 716 F. Supp. 2d at 1082–83; *Soriano v. Bd. of Educ.*, No. 01 CV 4961 (JG), 2004 U.S. Dist. LEXIS 21529, at *5 (E.D.N.Y. Oct. 27, 2004).

¹⁵⁸ *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998).

¹⁵⁹ *See* *Davis*, 526 U.S. at 650 (failing to follow or create a reasonableness standard).

V. REEXAMINING THE SEVERE, PERVASIVE, AND OBJECTIVELY OFFENSIVE TEST

The main issue with the *Davis* test is how the severe, pervasive, and objectively offensive language has been interpreted to ignore the victim's dignity. If a test more similar to Title VII's "objectively severe or pervasive" is applied without being adequately formulated for a classroom setting, too much litigation would result. Thus, a new model that takes students' dignity into account is necessary. In her article on creating new sexual harassment protections for prisons, Camille Gear set forth a "non-workplace sexual harassment doctrine" that fits within the scheme of Title IX protection from peer sexual harassment.¹⁶⁰ The doctrine consists of three factors: "(1) the fair or reasonable dignity expectations of the target as a consequence of the target's position in a particular institutional setting, (2) the institution's responsibility to protect the target from invasion of these interests, and (3) the target's actual agency."¹⁶¹

Some may argue that lowering the standards for peer sexual harassment will cause a flood of litigation, and put an unreasonable amount of responsibility upon teachers to control the uncontrollable.¹⁶² Excess litigation would be unlikely though, since this interpretation of Title IX takes into account the institution's responsibility toward the students and the limits imposed by Title IX. This altered test redirects focus from the act itself, to the school's response to the act. Schools can enact institutional responses to react to instances of witnessed or reported sexual harassment as they already do in response to bullying or disruptive behavior. Understanding what crosses the line from friendly kidding to sexual harassment can be difficult for teachers and students, especially during a period of children's lives when many are experimenting with social behavior.¹⁶³ The best response to this is that schools can teach students what constitutes sexual harassment.¹⁶⁴ Students will have to understand sexual harassment when they enter the workforce.¹⁶⁵ Why not begin this kind of education before reaching adulthood?

¹⁶⁰ Rich, *supra* note 16, at 5.

¹⁶¹ *Id.* at 59.

¹⁶² *Davis*, 526 U.S. at 672–73 (Kennedy, J., dissenting).

¹⁶³ Scherer, *supra* note 28, at 2138.

¹⁶⁴ *See id.* ("Respect and proper conduct, especially proper sexual conduct, are ideas that can be incorporated into the school curriculum from kindergarten to twelfth grade.")

¹⁶⁵ *Id.* at 2138–39.

A. REASONABLE DIGNITY EXPECTATIONS

The proposed test requires a workable understanding of what the dignity expectations of students are. Gear stated that individuals are “entitled to the preservation of dignity interests cultivated by the institutions [they are participating in] and of any preexisting dignitary rights that are not inconsistent with the institution’s functioning.”¹⁶⁶ Some caveats exist, however, as courts cannot always take an institution’s claims about the need to compromise dignitary rights at face value.¹⁶⁷ Many schools claim that some compromise of a student’s dignity is necessary to effectively run a school, and that they do not have enough control to eradicate sexual harassment.¹⁶⁸ While students must give up some rights in order to attend school, sexual harassment that bars students from receiving all the benefits of an education negates the very purpose for children to attend school. The key under this prong is to identify what the baseline level of respectful conduct is that students should reasonably expect in schools, rather than settle for the less than ideal conditions that may exist.¹⁶⁹ Inserting a baseline expectation of dignity into Title IX’s severe, pervasive, and objectively offensive test promotes an evaluation that is little different from Title VII’s reasonableness standard and encourages courts to consider what amount of dignity children deserve at school.¹⁷⁰

Currently under *Davis*, students are protected from sexual violence, like rape and other extreme sexual assault, though not from verbal sexual harassment, or single instances of assault. *Davis* reflects the difficulty that the Supreme Court, and adults generally, have in sexualizing young children by applying the term “sexual harassment,” or discrimination “because of sex” to the actions of students.¹⁷¹ Children are often presumed to be incapable of engaging in sexual harassment, which sends conflicting messages to both victims and aggressors.¹⁷² The example of peer sexual harassment in *Davis* is unhelpful because it does not provide a realistic portrayal of typical sexual harassment cases. *Davis* asked readers to “consider, for example, a case in which male students physically threaten

¹⁶⁶ Rich, *supra* note 16, at 60.

¹⁶⁷ *Id.* at 61.

¹⁶⁸ *See id.* at 64 (making a comparable claim for prisons).

¹⁶⁹ *Id.* at 61.

¹⁷⁰ *See id.* at 5 (advocating that harassment law should prevent “dignitary harm”).

¹⁷¹ Shelby Jean, Comment, *Peer Sexual Harassment Since Oncale and Davis: Taking the ‘Sex’ Out of ‘Sexual Harassment’*, 2000 L. REV. MICH. ST. U. DET. C.L. 485, 489 (2000).

¹⁷² *Id.*

their female peers every day, successfully preventing the female students from using a particular school resource.”¹⁷³ This scenario avoids sexualizing children completely, and there is nothing that suggests that the denial of educational resources is due to sexual harassment rather than bullying. In another case, a teacher maintained that his male students’ conduct “could not be sexual harassment ‘due to the young age of the students involved.’”¹⁷⁴ This characterization of students’ conduct may be made because adults can find it difficult to remember the mental and emotional states of their childhood,¹⁷⁵ or because they have replaced the reality of their own childhood with an idea of what children should represent in society.¹⁷⁶ Regardless of the reason, this reluctance to view the actions of children as sexual harassment leaves the victims unprotected from acts that can have a serious psychological impact on them.

Establishing reasonable dignitary expectations for students, therefore, requires admitting the existence of peer sexual harassment, and giving more protection against sexual harassment than what currently exists in the courtroom and in many schools. The U.S. Department of Education’s Office for Civil Rights’ discussion of peer sexual harassment provides an appropriate baseline for informing schools about the reasonable dignitary expectations of students beyond what currently exists in the courtroom and in many schools.¹⁷⁷ The office’s definition of sexual harassment is “unwelcome conduct of a sexual nature, which can include unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.”¹⁷⁸ The Office for Civil Rights goes further to define sexual harassment, and states:

sexual harassment prohibited by Title IX can include conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures;

¹⁷³ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999).

¹⁷⁴ *Jean*, *supra* note 171, at 501 (quoting *Bruneau v. S. Kortright Sch. Dist.*, 163 F.3d 749, 752 (2d Cir. 1998)).

¹⁷⁵ DAVID KENNEDY, *THE WELL OF BEING: CHILDHOOD, SUBJECTIVITY, AND EDUCATION* 15 (“Adults live with their own childhoods in an ambiguous state of memory and forgetting. Most experience what Freud called ‘childhood amnesia,’ the near total loss of memory of the events and the mental and emotional states of one’s early years.”).

¹⁷⁶ *Id.* at 14 (“Like any ideology, the ideology of adulthood, which depends on and interacts with a theory of childhood, has its origins in larger issues than just those of education or child rearing. An ideology of adulthood implies a set of cultural norms that determine beliefs . . . about the relationship between good and evil, autonomy and heteronomy, justice and injustice . . . a view of persons and of the nature of cosmos.”).

¹⁷⁷ *See generally* Ali, *supra* note 27 (providing advice and examples of harassment to help understand their obligations).

¹⁷⁸ *Id.* at 6.

writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating e-mails or Web sites of a sexual nature.¹⁷⁹

Thus, according to the guidelines set by the U.S. Department of Education, students have the right to attend classes without worrying about being groped in hallways, verbally harassed or forced into sexual acts.¹⁸⁰

When courts determine what actions are severe, pervasive and objectively offensive enough to reduce access to education, they should first consider whether the act violates the dignity standards of the student, rather than attempting to protect the school from litigation. The dignity expectations of students are dependent upon the age of the child—the younger a student is, the more rights the student surrenders, although a student never surrenders all dignity. In evaluating the actions of the child, the court should first consider whether the act violates the dignity standards of the student, and the educators should account for the age of the perpetrator as well as the act.

B. WHAT IS THE INSTITUTION'S RESPONSIBILITY?

A school has a responsibility to its students because it has a fiduciary duty to them, and a relationship of trust with them.¹⁸¹ The depth of this trust and duty is an important issue that is difficult to determine. One must consider whether students have given up “certain rights or freedoms that might otherwise allow [the students] to protect themselves from harassing conduct.”¹⁸² School disciplinary codes affect students’ abilities to react and protect themselves from harassment.¹⁸³ Some students, who might

¹⁷⁹ *Id.*

¹⁸⁰ *See id.* (describing conduct that constitutes sexual harassment).

¹⁸¹ *See Rich, supra* note 16, at 63 (noting that relationships of trust and fiduciary duties create a responsibility for an institution to maintain its members’ dignity).

¹⁸² *Id.*

¹⁸³ Zero-tolerance rules at schools often punish children acting in self-defense, as well as those who started the fight, though many of these rules are being withdrawn. Cherry Henault, *Zero Tolerance in Schools*, 30 J.L. & EDUC. 547, 548 (2001). “In February, 2001, the American Bar Association voted to recommend ending [zero-tolerance] policies for school discipline.” *Id.*; *see also, e.g.*, Carley Gordon “Self Defense Bill Would Eliminate Zero Tolerance At Schools,” WSMV.COM, (April 15, 2013, 9:10 AM), <http://www.wsmv.com/story/21236423/tn-bill-would-allow-self-defense-in-fights-at-school> (“The new law would eliminate the notion of zero tolerance and allow students to fight back in self-defense or step in to defend a classmate

fight back if harassed or groped on the street, may be more reluctant to do so on school grounds because they fear punishment.¹⁸⁴ Thus, schools have a greater duty to protect students from sexual harassment. Many schools may object that it is unfair to ask the institutions to take on liability for the actions of students. However, this prong does not necessitate that schools be held liable for every act of peer sexual harassment that affects a target's dignity. Rather, it requires that schools have sexual harassment policies in place, and respond to sexual harassment complaints efficiently and fairly. However, some schools have overreacted by implementing zero-tolerance harassment policies that do not take age into account.¹⁸⁵ While young students should not touch each other's buttocks, for instance, the school should respond appropriately by teaching students that the actions were wrong as opposed to calling the police.¹⁸⁶

In *Davis*, Justice O'Connor stated that schools must take action in response to behavior that prevents access to school resources.¹⁸⁷ Harassment that keeps children from receiving an education is not consistent with the institution's responsibility to provide students with access to school resources. The school "has an interest in ensuring that its students act in a respectful manner . . . and that they do not interfere with the orderly conduct of school activities."¹⁸⁸ Furthermore, schools are considered the arena through which students learn appropriate behavior in the workplace.¹⁸⁹ Schools already teach young students not to hit or kick each other, and implementing programs that teach students what sexual harassment is, and how to respond to it, could be easily incorporated into lessons that grow more intensive as students age.

Instead of focusing heavily on whether a student's actions rise to the level of sexual harassment, courts should also look at whether the school

without fear of punishment.").

¹⁸⁴ Henault, *supra* note 183, at 549.

¹⁸⁵ Bridget Schulte, *For Little Children, Grown-Up Labels As Sexual Harassers*, WASHINGTONPOST.COM, April 3, 2008, <http://www.washingtonpost.com/wp-dyn/content/story/2008/04/02/ST2008040203589.html>.

¹⁸⁶ *Id.* (noting that a school reported a first grade student to the police for slapping the bottom of another student.)

¹⁸⁷ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650–51 (1999).

¹⁸⁸ *Posthumus v. Bd. of Educ.*, 380 F. Supp. 2d 891, 899 (W.D. Mich. 2005).

¹⁸⁹ *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 681 (1986) (quoting C. BEARD & M. BEARD, *NEW BASIC HISTORY OF THE UNITED STATES* 228 (W. Beard ed., 3d rev. ed. 1968) ("Public education . . . must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation.")).

fulfilled its responsibility by responding appropriately to the situation. As long as educators respond to acts that they are aware of, schools will be protected from excess litigation, even with the lower severe, pervasive, and objectively offensive test that takes into consideration a student's dignity interests.

C. WHAT IS THE AGENCY OF STUDENTS?

The final consideration of this Note's proposed test regards the agency of students. The agency prong requires courts to consider: "(1) whether the harassment target is capable of consenting to certain sexualized treatment and (2) what kind of power is available to a target attempting to rebuff a harasser."¹⁹⁰ In order to accurately assess this prong, courts must account for the age and sophistication of students, as well as the legal age of consent and nature of the conduct. The second question under this prong requires courts to look at the power available to the victim to resist harassment.¹⁹¹ As stated previously, students give up their ability to escape their aggressors due to being in an enclosed environment, and having their ability to fight back restrained due to fear of disciplinary measures.¹⁹²

Consider, as an example of student agency under both prongs, separating children into stratified age groups: preschool through first grade, second grade through sixth grade, and seventh grade through twelfth grade. Though this classification might not appropriately take into account individual differences, the groups are broken up roughly into ages that might reflect the child's ability to understand and give consent. Within this example classification scheme, the first, youngest group of children have the least amount of agency, as they are the least likely to be capable of consenting to sexualized treatment and have the least amount of power to rebuff a harasser. Sexual harassment claims in this age group still need to be taken seriously and adequately responded to, though schools should be careful to not overreact. For example, in *Doe v. Dallas Independent School District*, John Doe, a five year old, had a history of fondling and grabbing female classmates, and Jane Doe II had previously complained about her buttocks being grabbed by her classmate.¹⁹³ The

¹⁹⁰ Rich, *supra* note 16, at 65–66.

¹⁹¹ *Id.* at 67.

¹⁹² See *supra* Part IV.B. (explaining a school's responsibility to respond to accusations of sexual harassment).

¹⁹³ *Doe v. Dall. Indep. Sch. Dist.*, No. CA 3:01-CV-1092-R, 2002 U.S. Dist LEXIS 13014, at

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school responded to the complaint with “deliberate indifference,” as the teachers told Jane Doe II to “forget the incident.”¹⁹⁴ Instead of teaching John Doe that his actions were inappropriate, and attempting to separate the two children, the school allowed his actions to escalate to the point where John Doe used his hand to violate Jane Doe II’s vagina.¹⁹⁵ While this case might be an extreme example of what occurs between young children, courts must consider that young children have little power to rebuff a harasser, even a peer. Therefore, it is important for schools to act in response to complaints.

In the older age ranges, students could be expected to have an increased ability to consent to actions and slightly more agency to rebuff a harasser. As students grow older, there are a wider variety of actions that they consent to, such as having boyfriends and girlfriends. Assuming that report procedures are in place at the school, there is also greater opportunity to report harassment. Overall, the older the students, the more agency the students have to protect themselves from harassment.

Courts must also consider whether complaint procedures existed for students to report sexual harassment, and whether students have been informed on how to utilize these procedures. They should also consider whether schools have tried to educate students about sexual harassment and make them feel comfortable about reporting it. These are important considerations in determining what is severe, pervasive, and objectively offensive. This inquiry must be flexible, fact based, and take into account age and any developmental disabilities to adequately protect students.

VI. CONCLUSION

Overall, the severe, pervasive, and objectively offensive doctrine that courts have created to protect students from peer sexual harassment under Title IX has fallen short of its goal. Though courts must be careful not to impose too much liability upon schools for the actions of students, society should acknowledge that schools are able to control how they respond to sexual harassment and able to ensure that a student’s educational opportunities are not infringed upon. The current *Davis* test provides incentive for schools to respond to the most egregious of sexual harassment complaints, but does not attempt to remedy the situation at schools by ensuring that schools take appropriate steps to try and stop

*1–2 (N.D. Tex. Jul. 16, 2002)

¹⁹⁴ *Id.* at *4.

¹⁹⁵ *Id.* at *2.

sexual harassment before it occurs. Title VII's purpose is to not only provide a remedy to injured victims, but to also attempt to stop workplace harassment. Title IX was written with a similar goal in mind for schools, but courts have fallen short in encouraging the eradication of sexual harassment and making schools a nonhostile environment for children.

By using the language of Title VII, the Supreme Court has avoided widespread criticism for the unrealistically high test that was put forth in *Davis*. The best way to remedy this problem is to alter the Title IX test under *Davis*, so that it rightfully accounts for the dignity interests of students. Using a dignity model as a baseline to understand what is severe, pervasive, and objectively offensive requires courts to consider the dignity of the victim, the responsibility of the school, and the age of the parties involved. The test does not allow excessive litigation against schools, and it will provide an incentive for schools to reduce and respond to peer sexual harassment and create a healthier educational environment for children.